IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

CURRY SMITH	§	
v.	§	CIVIL ACTION NO. 6:10cv502
SHERMAND COOPER, ET AL.	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND ENTERING FINAL JUDGMENT

The Plaintiff Curry Smith, a former inmate of the Texas Department of Criminal Justice, Correctional Institutions Division proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights during his confinement in the prison. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Smith complained of an alleged use of force incident which occurred on September 4, 2010. He signed his complaint on September 22, 2010, and acknowledged that he did not exhaust his administrative remedies prior to filing the lawsuit.

On October 19, 2010, the Magistrate Judge issued a Report recommending that the lawsuit be dismissed without prejudice for failure to exhaust administrative remedies. The Magistrate Judge noted that the exhaustion requirement, being statutory, is not excused by a release from prison, but that this statute only applies to lawsuits filed while the plaintiff is in confinement, and a dismissal without prejudice will not prevent refiling. *See* Cox v. Mayer, 382 F.3d 422-424-25 (6th Cir. 2003). Smith received a copy of the Magistrate Judge's Report on October 25, 2010, but filed no objections thereto; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from

appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. <u>Douglass v. United Services Automobile Association</u>, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this case and the Report of the Magistrate Judge. Upon such review, the Court has determined that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled civil action be and hereby is DISMISSED without prejudice for failure to exhaust administrative remedies. It is further

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So ORDERED and SIGNED this 2nd day of December, 2010.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE